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In the Supreme Court of the United States

OCTOBER TERM, 1962

No. 1034

PRESTON P. COLEMAN, CIRCUIT CLERK AND REGISTRAR OF LAUDERDALE COUNTY, MISSISSIPPI, ET AL., PETITIONERS

v.

ROBERT F. KENNEDY, AS ATTORNEY GENERAL OF THE UNITED STATES

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

MEMORANDUM FOR THE RESPONDENT

OPINIONS BELOW

The opinion of the district court (R. 26) is reported at 208 F. Supp. 199. The opinion of the court of appeals (R. 469) is reported at 313 F. 2d 867.

JURISDICTION

The judgment of the court of appeals was entered on February 13, 1963 (R. 472), and petitioners' motion for rehearing was denied on March 15, 1963 (R. 505). The petition for a writ of certiorari was filed on April

19, 1963. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether a proceeding to determine whether the Attorney General is entitled to the production of voting records under the Civil Rights Act of 1960 is a case or controversy within the meaning of Article III of the Constitution.

2. Whether the order of the district court, requiring petitioners to produce voting records under the Civil Rights Act of 1960 without providing them with the specific information underlying the Attorney General's demand for the records and without allowing them to cross-examine any persons who might have given the Attorney General this information deprived them of due process or the right to confrontation under the Fifth or Sixth Amendments to the Constitution.

3. Whether the district court erred in holding that the Attorney General's demand for voting records complied with the requirements of the Civil Rights Act of 1960.

STATUTE INVOLVED

Title III of the Civil Rights Act of 1960 (74 Stat. 88, *et seq.*, 42 U.S.C. (Supp. II) 1974, *et seq.*) provides:

> SEC. 301. —Every officer of election shall retain and preserve, for a period of twenty-two months from the date of any general, special, or primary election of which candidates for the office of President, Vice President, presidential elector, Member of the Senate, Member of the House of Representatives, or Resident Commissioner from the

Commonwealth of Puerto Rico are voted for, all records and papers which come into his possession relating to any application, registration, payment of poll tax, or other act requisite to voting in such election, except that, when required by law, such records and papers may be delivered to another officer of election and except that, if a State or the Commonwealth of Puerto Rico designates a custodian to retain and preserve these records and papers at a specified place, then such records and papers may be deposited with such custodian, and the duty to retain and preserve any record or paper so deposited shall devolve upon such custodian. Any officer of election or custodian who willfully fails to comply with this section shall be fined not more then $1,000 or imprisoned not more than one year, or both.

SEC. 302. —Any person, whether or not an officer of election or custodian, who willfully steals, destroys, conceals, mutilates, or alters any record or paper required by section 301 to be retained and preserved shall be fined not more than $1,000 or imprisoned not more than one year, or both.

SEC. 303. —Any record or paper required by section 301 to be retained and preserved shall, upon demand in writing by the Attorney General or his representative directed to the person having custody, possession, or control of such record or paper, be made available for inspection, reproduction, and copying at the principal office of such custodian by the Attorney General or his representa-

tive. This demand shall contain a statement of the basis and the purpose therefor.

SEC. 304. —Unless otherwise ordered by a court of the United States, neither the Attorney General nor any employee of the Department of Justice, nor any other representative of the Attorney General, shall disclose any record or paper produced pursuant to this title, or any reproduction or copy, except to Congress and any committee thereof, governmental agencies, and in the presentation of any case or proceeding before any court or grand jury.

SEC. 305. —The United States district court for the district in which a demand is made pursuant to section 303, or in which a record or paper so demanded is located, shall have jurisdiction by appropriate process to compel the production of such record or paper.

SEC. 306. —As used in this title, the term "officer of election" means any person who, under color of any Federal, State, Commonwealth, or local law, statute, ordinance, regulation, authority, custom, or usage, performs or is authorized to perform any function, duty, or task in connection with any application, registration, payment of poll tax, or other act requisite to voting in any general, special, or primary election at which votes are cast for candidates for the office of President, Vice President, presidential elector, Member of the Senate, Member of the House of Representatives, or Resident Commissioner from the Commonwealth of Puerto Rico.

STATEMENT

The Attorney General, through his authorized agents, demanded of petitioners Coleman, Campbell, and Ashford (on February 27, 1962, April 30, 1962, and July 2, 1962, respectively), pursuant to Title III of the Civil Rights Act of 1960, that they make available for inspection and copying their registration and voting records relating to election for federal office (R. 4, 142, 281). These demands were refused (R. 13-14, 158, 329). Accordingly, the Attorney General filed in the District Court for the Southern District of Mississippi, applications for orders, pursuant to Section 305 of the Act (42 U.S.C. (Supp. II) 1974(d)) requiring the production of records for inspection, reproduction, and copying (R. 1, 140, 278). A hearing was held on September 5, 1962 (R. 47), and on September 8, 1962, the district court rendered an opinion upholding the Attorney General's right to the requested inspection order (R. 27).

On September 11, 1962, the court entered orders in accordance with its opinion of September 8, 1962 (R. 32, 163, 335), requiring that the voting records be made available for inspection and copying, commencing on September 17, September 20, and September 25, 1962 (R. 34, 164, 336). On September 14, 1962, the district court granted stays of its orders pending appeal (R. 37, 168, 339). On November 16, 1962, the court of appeals vacated the district court's stay (R. 446). On January 8, 1963, however, the court of appeals entered an order staying the execution of its order of November 16, 1962, and setting the appeals for hearing on the merits (R. 466).

On February 13, 1963, the court of appeals rendered its opinion which concluded that "[t]he present appeals are totally without merit, and the judgments are affirmed" (R. 471; 313 F. 2d at 868). On March 15, 1963, it denied a petition for rehearing (R. 505). On March 21, 1963, Judge Rives entered an order staying the execution and enforcement of the inspection orders of the district court and of the judgment and mandate of the court of appeals for a period of 30 days to permit the filing of a petition for certiorari with this Court, the stay to continue in force until the final disposition of the case by this Court.

ARGUMENT

This case illustrates a serious and continuing problem which has arisen in enforcing Title III of the Civil Rights Act of 1960. That Title was intended to provide the Attorney General with a simple and expeditious procedure for obtaining registration and voting records. H. Rep. No. 956, 86th Cong., 1st Sess., p. 7; *Kennedy* v. *Lynd*, 306 F. 2d 222 (C.A. 5), certiorari denied, 371 U.S. 952. Nonetheless, repeated stays have been granted in this case; as a result, for approximately a year, the Attorney General has been prevented from obtaining the voting records and proceeding with the investigation. The stays were granted even though, as we show below, all of the questions presented by petitioners have been disposed of by court of appeals' decisions which this Court has declined to review. Developments in subsequent cases suggest that this will be a continuing pattern.

In these circumstances and in order to remove any

doubt concerning the validity of enforcement proceedings under Title III of the Civil Rights Act of 1960, we suggest that certiorari be granted and the judgment below summarily affirmed. In an analogous situation, involving the scope of relief under the Civil Rights Act of 1957, a similar disposition was ordered by the Court. See *United States* v. *Alabama*, 192 F. Supp. 677 (M. D. Ala.), affirmed, 304 F. 2d 583 (C.A. 5), affirmed, 371 U.S. 37. In the alternative, we propose that the petition for a writ of certiorari be denied.

1. Petitioners contend (Pet. 22-27) that a district court proceeding to enforce the Attorney General's demand for voting records pursuant to the Civil Rights Act of 1960 is not a "case or controversy" within the meaning of Article III of the Constitution. This claim is clearly without merit. As the court of appeals held in *Kennedy* v. *Lynd*, *supra*, 306 F. 2d at 225:

> There are adversaries—the Attorney General seeking an order against the objecting State official as custodian. § 1974b. The dispute is real and present as the application seeks "appropriate process," § 1974d, in order "to compel the production" of records or papers demanded by the Attorney General in writing. § 1974b. That by its terms and operation, Title III narrowly circumscribes the issues upon which the Court is to act does not make the proceeding or that determination any less judicial.

2. Petitioners also argue (Pet. 10-22) that they were denied due process and the right to confrontation under the Fifth and Sixth Amendments because they were not

given access to the information in the Attorney General's possession which constituted the basis of his inspection demand (Pet. 12) and were not afforded the right of confrontation and cross-examination of the persons who gave the Attorney General this information (Pet. 19-20). Petitioners reason (Pet. 13-14, 19-20) that the very demands by the Attorney General damaged their reputation and the information sought will be used to determine whether they have have committed a criminal offense.

These contentions are without merit for three reasons. First, the records involved are not the registrars' —they are the State's. Accordingly, the registrars may not object to the surrender of these records on grounds which relate to themselves. See *Wilson* v. *United States*, 221 U.S. 361, 380; *United States* v. *White*, 322 U.S. 694. While, as representatives of the State, they may raise any objections the State may have, the State is not endangered by loss of reputation or criminal prosecution.

Second, the materials ordered to be produced are records pertaining to federal elections. Therefore, the State's right *vis-à-vis* the federal government is extremely limited. Surely, the United States has the bare right to inspect and copy these official records pursuant to statutory authorization without a full trial of the need for the records.

Third, this Court rejected a similar contention in *Hannah* v. *Larche*, 363 U.S. 420. In that case, the Civil Rights Commission was attempting to compel the testimony of witnesses, whereas here the Attorney General sought only the inspection and copying of records.

As the Court held, the due process clause does not require that in an investigation, as opposed to an adjudicatory proceeding, persons under investigation be informed of the identity of the complainants or given the right to cross-examine them. *Id.* at 440, 453. The Court further observed that the Sixth Amendment "is specifically limited to 'criminal prosecutions' * * *." *Id.* at 440, note 16. Similarly here, the inspection and copying of records by the Attorney General is part of an investigation, not a criminal prosecution or adjudication. Indeed, the Attorney General has no power to adjudicate; he may merely initiate a lawsuit.[1] See *Kennedy* v. *Lynd*, *supra*, 306 F. 2d at 225, 228; *Alabama ex rel. Gallion* v. *Rogers*, 187 F. Supp. 848, 854 (M.D. Ala.), affirmed *sub. nom. Dinkens* v. *Attorney General*, 285 F. 2d 430 (C.A. 5), certiorari denied, 366 U.S. 913.[2]

3. Petitioners' contentions (Pet. 27-37) that Title III of the Civil Rights Act of 1960 has been misapplied are plainly without merit.

First, petitioners argue that the Attorney General's demand for records did not adequately state its basis

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[1] This position is in no way inconsistent with our argument that the proceeding in the district court is adjudicatory and therefore is a "case or controversy." The district court was required to adjudicate whether the Attorney General was entitled to production of the records.

[2] *Joint Anti-Fascist Committee* v. *McGrath*, 341 U.S. 123, which is relied upon by petitioners (Pet. 9-13, 15), is entirely inapposite. That case involved, as this Court stated in *Hannah* v. *Larche*, *supra*, 363 U.S. at 451, "determinations in the nature of adjudications affecting legal rights." In contrast, the order of the district court below was merely that petitioners produce voting records for inspection and copying.

and purpose, and was too broad in requiring the production of all records in their possession relating to any application or other act requisite to voting. The demand letters to the registrars expressly stated (R. 5, 143, 282):

> This demand is based upon information in the possession of the Attorney General tending to show that distinctions on the basis of race or color have been made with respect to registration and voting within your jurisdiction.
>
> The purpose of this demand is to examine the aforesaid records in order to ascertain whether or not violations of Federal law in regard to registration and voting have occurred.

Considering the summary nature of enforcement proceedings under Title III, these allegations were plainly sufficient. They state, in general terms, the basis and purpose of the Attorney General's demand. Senator Keating, a principal spokesman for the Act, explicitly said on the floor of Congress that such a statement is sufficient. 106 Cong. Rec. 7767. As to the scope of the demand, the letters ask for production of precisely those records which Sections 301 and 303 of the Act, *supra*, pp. 2-3, give the Attorney General the right to request.[3] There is nothing in the statute to indicate

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[3] The demand did not specifically limit the records to be produced to those pertaining to elections within the last 22 months as Sections 301 and 303 of the Act require. However, the demand and the district court's order clearly were meant to apply only to such records. It should be noted that a record may relate to voting in an election

that the Attorney General is required to identify with greater specificity the individual records to be produced. Such a rule would seriously hamper the Attorney General's investigation of deprivation of voting rights under the Act by requiring him to obtain and disclose detailed information before he could utilize the Act's investigatory procedures. Identical letters have been held to be sufficient in *Kennedy* v. *Bruce*, 298 F. 2d 860, 863 (C.A. 5); *United States* v. *Lynd*, 301 F. 2d 818, 822 (C.A. 5), certiorari denied, 371 U.S. 893; *Kennedy* v. *Lynd*, *supra*, 306 F. 2d at 226, and *Alabama ex rel. Gallion* v. *Rogers*, *supra*, 187 F. Supp. at 855.

Second, petitioners contend that the lower courts erred in granting the Attorney General permission to inspect records that came into existence prior to May 6, 1960, the effective date of the Civil Rights Act of 1960. Registrars admittedly cannot be held liable under Title III for any acts committed prior to the passage of the Civil Rights Act; therefore they cannot be punished for failing, prior to May 6, 1960, to preserve records. Since, however, it is well settled that a statute normally speaks from the time of its enactment (*De Lima* v. *Bidwell*, 182 U.S. 1, 197), the obligation to retain records became effective the day the Act was passed and, consequently, registrars were then required to retain for the future whatever records were then in their possession. Thus, in *Alabama ex rel. Gallion* v. *Rogers*, Judge Johnson held that records must be retained for a period of twenty-two months from the date of any of the

within 22 months of the demand even though it came into the possession of the registrar many years before—for example, when a State has permanent registration. *Kennedy* v. *Lynd*, *supra*, 306 F. 2d at 227.

specified elections "[r]egardless of when these records came into the possession of the election official." 187 F. Supp. at 855. Any other construction of the statute would undermine its effectiveness by preventing the Attorney General from obtaining many records which came into the possession of registrars before 1960 and continue to have a direct bearing upon current elections.

CONCLUSION

For the foregoing reasons, it is suggested that the petition for a writ of certiorari should be granted and the decision below summarily affirmed. If summary affirmance be judged inappropriate, the petition for a writ of certiorari should be denied.

Respectfully submitted.

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